FREE COPY

MAY 15 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1576

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

DEAN COAL COMPANY, *Respondent*

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

W. R. PARTON, d/b/a PARTON COAL COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EDWARD L. CAREY
HARRISON COMBS
WILLARD P. OWENS
900 Fifteenth Street, N.W.
Washington, D.C. 20005

M. E. BOIARSKY
512 Kanawha Valley Building
Charleston, West Virginia 25330

E. H. RAYSON
Valley Fidelity Bank Building
Knoxville, Tennessee 37901

Counsel for Petitioner, United Mine Workers of America

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Table of Contents

	Page
Opinions Below	2
Jurisdiction	3
Basis for Federal Jurisdiction in the District Court	3
Questions Presented	3
Statute Involved	3
Statement of the Case	3
Statement of Facts	5
A. The Dean Case	5
B. The Parton Case	7
C. The Sixth Circuit's Opinion	10
Reasons for Granting the Writ	11
I The Sixth Circuit's Affirmance of the District Court's Judgments Represent an Incorrect Implementation of this Court's Interpretation of Liability of a Labor Union Under Section 6 of the Norris-LaGuardia Act	11
II The Sixth Circuit's Approval of the Damage Awards Herein Is in Conflict With This Court's *Gibbs* and *Pennington* Decisions	16
Conclusion	18

Table of Cases

Lewis v. Pennington, 257 F. Supp. 815, *affirmed* 400 F.2d 806 (6th Cir. 1968), *cert. denied*, 393 U.S. 983 (1968) 4, 16

United Brotherhood of Carpenters and Joiners of America, et al. v. United States, 330 U.S. 395 (1946) 11, 12, 15

Page

United Mine Workers v. Gibbs, 383 U.S. 715, 729 (1966) 11, 12, 15, 16, 17, 18

United Mine Workers v. Pennington, 381 U.S. 657, 671 (1965) 17

STATUTES AND CODES

The Act of July 2, 1890, c. 647, § 1, Sherman Antitrust Act, 26 Stat. 209, 15 USCA 1, as amended 3, 4, 17

The Act of March 23, 1932, Norris-LaGuardia Act, c. 90, § 6, 47 Stat. 71, 29 USC 106 ..... 3, 10, 11, 12, 13, 15, 17

The Act of July 5, 1935, c. 372, National Labor Relations Board Act, 49 Stat. 453, 29 USC 159, § 9(c)(3), as amended 6

The Act of June 30, 1936, c. 881, § 1, 49, Walsh-Healey Act, 49 Stat. 2036, 41 USC 35-45, as amended .. 5, 7, 17

The Act of September 14, 1959, The Labor-Management Reporting and Disclosure Act, 73 Stat. 519-541, 29 USC 401-531, § 9(c)(3), as amended 6

28 USCA 1254(1) 3

28 USCA 2101(e) 3

MISCELLANEOUS

Stern & Gressman, Fourth Edition, Section 6-32 2

Restatement of Torts, § 775 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

DEAN COAL COMPANY, *Respondent*

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

W. R. PARTON, d/b/a PARTON COAL COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, United Mine Workers of America (called "UMW" herein), prays a Writ of Certiorari issue to review judgments of the United States Court of Appeals for the Sixth Circuit,[1] entered February 18, 1970, in the cases numbered 19,610 and 19,611, styled Dean Coal Company, plaintiff-appellee v. United Mine

[1] Called "Sixth Circuit" herein.

Workers of America, defendant-appellant, and W. R. Parton, d/b/a Parton Coal Company,[2] plaintiff-appellee v. United Mine Workers of America, affirming the judgments entered April 9, 1969 by the United States District Court for the Eastern District of Tennessee, Northern Division,[3] against United Mine Workers of America and in favor of Dean for $127,500, and in favor of Parton for $129,800 (JSA 15).[4]

A certified transcript of record in said cases, with the proceedings in the Sixth Circuit, is furnished herewith, in accordance with this Court's rules.[5]

OPINIONS BELOW

The Sixth Circuit's opinion appears in Appendix B to this Petition (p. A 11a); and in the certified transcript of record. The opinion is not officially reported. It is unofficially reported in 62 CCH Labor Cases ¶ 10,682.

The District Court's memorandum appears in Appendix A to this Petition at p. A 1a; and in the certified Joint Appendix at pp. JSA 3-12. The memorandum is not reported.

---

[2] Called "Dean" and "Parton" herein, or as "plaintiffs".

[3] Called "District Court" herein.

[4] Page references with the prefix "JSA" are to the volume of the certified record entitled Joint Supplemental Appendix, as filed in the Court of Appeals. Page references with the suffix "a" are to the volumes of the certified record entitled Joint Appendix, as filed in the Court of Appeals. References to the Appendix to this Petition are indicated by the symbol "A".

[5] These cases were consolidated for trial in the District Court, and, as noted in the Sixth Circuit's opinion, "were combined for briefing, argument and consideration" in the Sixth Circuit. Accordingly, petitioner deems it appropriate to file a single petition herein. *Stern & Gressman*, Fourth Edition, Section 6-32.

JURISDICTION

The Sixth Circuit's judgment was entered February 18, 1970. This Court's jurisdiction is invoked under 28 USCA §§ 1254(1) and 2101(c).

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

Jurisdiction of the District Court was based upon the Sherman Act (15 USCA 1 *et seq.*) and upon the theory of pendent jurisdiction, by which latter theory it was found the District Court had jurisdiction to determine alleged state law causes of action asserted by Dean and Parton.

QUESTIONS PRESENTED

1. In damage actions against a labor union subject to Section 6 of the Norris-LaGuardia Act, may liability be based upon alleged unlawful acts of individual agents in the absence of "clear proof" of union authorization thereof or union ratification of such acts after actual knowledge thereof?

2. In actions for damages under state law against a labor union based on alleged acts of violence, does the evidence suffice, under applicable law, to support the awards of compensatory damages?

STATUTE INVOLVED

The statutory provision involved is the Act of March 23, 1932, c. 90, 47 Stat. 71, Norris-LaGuardia Act, § 6, 29 USC § 106, set forth in Appendix C *infra*.

STATEMENT OF THE CASE

These are cases by two East Tennessee coal operators, Dean and Parton, against UMW, asserting that violence and threats of violence in a 1959 strike

constituted a violation of Tennessee common law entitling them to recover compensatory and punitive damages against UMW.

The cases were separately filed[6] but by agreement were consolidated for trial with six other cases and were tried without a jury. Plaintiffs primarily sought recovery under the Sherman Act, but their claims in this regard were dismissed. *Lewis* v. *Pennington,* 257 F.Supp. 815, *affirmed* 400 F.2d 806 (6th Cir. 1968), *cert. denied,* 393 U.S. 983 (1968). Judgments were granted by the District Court, however, on the pendant common law claims. Dean was awarded $101,787.41 in compensatory damages and $50,000 for punitive damages, or a total of $151,787.41. Parton was awarded $110,000 in compensatory damages and $50,000 in punitive damages, or a total of $160,000.

On appeals taken by UMW the Sixth Circuit reversed and remanded for further proceedings. *Lewis* v. *Pennington,* 400 F.2d 806. Upon remand the District Court stated it was familiar with and "intended to apply the 'clear proof' standard" in its original decision (JSA 4). The District Court thereupon reaffirmed its finding of liability but reduced the awards of damages. It entered judgment in favor of Dean for $77,500 in compensatory damages and $50,000 in

---

[6] Dean filed a complaint against UMW on May 15, 1962 and asserted its common law claim in the pretrial order of May 11, 1965 (73-74a, 82a, 107a).

Parton was the defendant in a suit commenced by the Trustees of the United Mine Workers of America Welfare and Retirement Fund filed on June 13, 1958. Parton thereafter filed a cross claim against UMW on November 27, 1961 (61a). As amended by the pretrial order of May 11, 1966, he sought recovery under the common law claim here involved (99a).

Issues were joined upon UMW's denial that it had violated state law (130a).

punitive damages, or a total of $127,500. Judgment in favor of Parton was entered for $79,800 in compensatory damages and $50,000 in punitive damages, or a total of $129,800 (JSA 15). Upon appeals again taken by UMW the Sixth Circuit affirmed, *per curiam,* the District Court's judgment.

STATEMENT OF FACTS

A. The Dean Case

Dean, a corporation, commenced business in 1954 as a coal mining company. It signed UMW agreements in 1954, 1955 and 1956 but contended the agreements had not been authorized by its board and did not abide by them (589a, 592a, 611-15a). It paid its employees near the level required by the Walsh-Healey Act (599a).

On March 16, 1959, a group of miners from the nearby Straight Fork Mine, estimated from 30 to 300, and including UMW District 19 Representative Prater, came to the Dean tipple (593a). Prater informed the tipple operator they wanted to speak to the Dean employees.[7] The superintendent closed the mine and Prater, in a speech to the employees, told them of union benefits and urged them to join the union. In response, the Dean employees stated they wanted to consider the matter by themselves (686-89a, 837a, 841a, 846-47a, 870-72a, 903a, 907a, 909a, 1454-58a, 1462a, 1474-75a, 1482a).

---

[7] The evidence of what Prater said to the superintendent is in dispute. In its original memorandum the District Court said, "The foreman sent for the stripping crew as ordered by the UMW representatives" (248a). Actually the Dean foreman acknowledged that Prater "asked me if I was going to knock the job off" (838a). He went on to say that more than two hours after Prater's arrival, he went to the mountain to get the men. The foreman said he told the men to quit because the truckers had been told by Prater to wait, but admitted he could have continued until normal quitting time (841-2a).

The next day a Dean employee called officers of the Straight Fork Local to meet with the Dean employees (1458a, 1484a). At the meeting thirteen Dean employees—a clear majority—signed union cards. Thereafter some of these employees informed the Dean superintendent they were going on strike for a UMW agreement (843a, 1484a).

Dean was shut down from March 16, 1959 until the first week in May, 1959, when it resumed operations with some of the same employees plus replacements for men who continued to strike (838a, 593a, 1923-24a).

Late in May a railroad trestle leading to the Dean mine was burned and an automobile occupied by Dean employees was struck by rifle fire. The employees, however, continued at work (595-96a, 839-40a). In early June unexploded dynamite was found on Dean's auger. Three employees (all strikers reemployed by Dean) testified they had been induced to place the dynamite on the auger by Representative Prater.

Later in 1959 Dean employees voted against UMW in an NLRB election from which the employees who were on strike were excluded as having been permanently replaced (616a, 1924a).[8]

Evidence of Damages. In the original judgment, Dean was awarded compensatory damages of $101,787.41, calculated by the District Court first by awarding the

---

[8] Under § 9(c) (3) of the National Labor Relations Act, 29 USC § 159(c)(3), then in effect, employees on strike who were not entitled to reinstatement were not entitled to vote. The Labor-Management Reporting and Disclosure Act of 1959, § 9(c)(3), as amended, permits economic strikers not entitled to replacement to vote during the twelve-month period following the start of the strike. Act of September 14, 1959, P.L. 86-257, 86th Cong., 1st Session.

total losses sustained in 1959 and 1960, or $50,757.41, and second by awarding loss of profits for the three-year period 1958-1960 at the rate of $17,000 per year (253a).

Upon remand the District Court confined damages to the years 1959 and 1960. It again awarded the total losses sustained in 1959 and 1960, rounding the loss to $51,000, and awarded damages for loss of profits for those two years in the amount of $26,500 (JSA 6-9).

The District Court based its award on what Dean would have earned but for the strike. The District Court did not consider the impact on Dean's earnings resulting from the strike of certain Dean employees and their continued refusal to work after Dean hired replacements. Likewise the District Court did not consider the propriety of the award for 1960 losses though violence had ceased by June, 1959. Moreover, while the District Court made a precise calculation of earnings, based upon higher coal prices, it disregarded higher expenses, resulting from an increase in wage rates under the Walsh-Healey Act, shown to be equivalent to the higher coal prices (JSA 5-8).

B. The Parton Case

Parton started mining in East Tennessee in 1954. He signed UMW agreements in 1954, 1955 and 1956, but, as Dean, did not comply with them. His noncompliance resulted in this action by the United Mine Workers of America Welfare and Retirement Fund for unpaid royalties in which the Fund recovered judgment for $58,777.69 (413a).

UMW gave notice of cancellation of its wage agreements with a number of East Tennessee coal operators and these agreements thus expired in March, 1959.

Area coal miners employed by these companies ceased work. There were motorcades in which District 19 Representative Ross participated (1498a), and in addition, a group of miners, without UMW authorization, picketed for three or four days the trucks hauling coal to TVA (1496-99a, 416-17a). Parton, who had ceased work in December, 1959, because of lack of coal orders and the weather, had not been given a notice of cancellation because UMW believed he had gone out of business (1493-94a).

In this setting Parton resumed mining on a new TVA contract. On April 15, 1959, Parton's truckers commenced hauling coal from the mine to a crusher where Parton himself was working (417-18a).

When the trucks reached the crusher, a group of men from two local unions who were on strike had gathered near Parton's crusher (418a, 886a). One of these men said, "We are not going to let you haul any coal". Someone ("they") told Parton to dump the coal on the ground near the crusher (420a).

No UMW representative was present while this was going on. Representative Ross, in whose area the Parton mine was located, didn't have any advance notice that anyone was going there and did not learn of it until after it happened (1494a). The District Court found, however, that some of the men who had gone to the Parton crusher obtained gas for the trip "paid for by UMW Field Representative Ross" (244a).

In August, 1959, an NLRB election was held at Parton's mine. "Southern Labor Union" was selected as bargaining representative, and Parton resumed work. He testified that he was never able to "get back into op-

eration, production or anything on any profitable basis" and that he had to turn his equipment back to the equipment company (245a, 428-30a). He testified of a shot being fired into his bulldozer shortly after he resumed work (JSA 10). He said he couldn't get enough employees or truckers (428a). Actually, Parton produced more coal in August and September than he had in the same months in 1958. His production then fell off and no explanation of the decline is found in the record. He surrendered his equipment after the first of 1960 (444-47a).

Evidence of Damages. In the original judgment the District Court awarded Parton a total of $110,000 compensatory damages, including the entire value of the "equity" in the equipment surrendered in 1960 (253a).

Upon remand, the District Court, as in the Dean case, awarded damages for loss of profits for 1959 and 1960 for $14,800 in the aggregate and $65,000 for loss of equipment, a total of $79,800 for compensatory damages (JSA 12).

The District Court found Parton's operating and earnings experience to have been as follows (JSA 11):

Year	Tonnage	Net Profits
1954	28,189.26	$19,865.90
1955	28,047.62	12,088.14
1956	45,782.33	25,409.03
1957	39,154.70	1,633.41
1958	22,968.83	9,414.22 (Loss)
1959	10,936.55	[9]

[9] There are no earnings records for 1959.

The record is blank on the nature of Parton's TVA contracts except for some spot contracts in 1957 and 1958 and two term contracts, each at the same price, for 1958 and the other for 1959, the latter being the contract on which Parton was working when he finally went out of business.

The District Court found Parton would have made a profit in 1959 and 1960 "without the violence". It based its award of lost profits on the supposition "if" Parton doubled his production (JSA 11). The District Court allowed recovery of the equity in the equipment on the theory Parton "had lost everything after the interruption of his business in 1959" (JSA 10).

The record is also silent on whether Parton would have been able to secure any business other than the TVA contract he had in 1959. This contract called for 30,000 tons, which was more than Parton had mined except in two years, 1956 and 1957.

C. The Sixth Circuit's Opinion

In its first opinion in these cases, the Sixth Circuit based its reversal and remand on the theory it could not determine from the District Court's opinion whether Norris-LaGuardia's "clear proof" rule had been applied, and because the District Court's findings as to damages (which appeared to the Sixth Circuit as "clearly erroneous") were not supported by specific findings.

Upon remand the District Court affirmed it had in fact used the clear proof rule in its original opinion. (The District Court's original opinion is found at pages 140-253a, with the material part thereof beginning at 239a to 253a.) Without discussion of the evi-

dence, the District Court thereupon, in its second opinion, reaffirmed its findings of liability. Similarly without discussion of the evidence, the Sixth Circuit held in its opinion on the second appeal that there was sufficient evidence to support the District Court's findings on liability. On the issue of damages the Sixth Circuit said the "evidence leaves much to be desired" but that its examination of the evidence failed to disclose prejudicial error.

REASONS FOR GRANTING THE WRIT

I

The Sixth Circuit's Affirmance of the District Court's Judgments Represent an Incorrect Implementation of This Court's Interpretation of Liability of a Labor Union Under Section 6 of the Norris-LaGuardia Act

The Sixth Circuit's affirmance of the District Court's judgments conflicts with the requirements of Section 6 of the Norris-LaGuardia Act and this Court's decisions in *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395 and *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966).[10]

The issue is whether evidence establishing arguendo unlawful acts of union organizers and evidence of unlawful acts of unknown individuals—without evidence of the authority of either from the union—is a basis

[10] Section 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106, reads as follows:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

for liability against the union under Section 6. We say Section 6—as written and construed—requires before liability may be imposed—*clear proof* that the particular act charged, or acts of that general type, had been (1) expressly authorized or (2) *necessarily* followed from a granted authority or (3) were subsequently ratified by the union after actual knowledge of its occurrence. Indeed the *Carpenters'* case holds as insufficient evidence the general authority of the agents for whose acts the labor union is sought to be charged.

In the cases at bar, the District Court did not, in either its original memorandum or its memorandum on remand, make any findings, however generously those findings may be read, that meet the requirements of Section 6. The District Court did just the opposite. The District Court (and the Sixth Circuit by its affirmance) necessarily proceeded on the theory that "clear proof" was satisfied by "clear proof" of the occurrence of an unlawful act and "clear proof" that a union field worker participated or was somehow involved therein. Neither Court considered whether the field worker was authorized to engage in the act or whether the union ratified the act after actual knowledge of it and the plaintiffs did not offer evidence on these pivotal issues. At the most the District Court found:

1. That shootings from ambush and dynamitings were perpetrated by persons unknown (244a). This is not evidence from which a finding of clear proof of UMW liability may be made. In *Gibbs* this Court rejected such evidence as a basis of liability saying that these acts were "never connected to any person or persons."

2. That Field Representative Prater induced striking Dean employees to place dynamite (which did not

explode) on the Dean auger (249a). Actually, the District Court did not so find. Rather, the District Court merely stated that employee "confessions" to that effect were made. No finding was made crediting that testimony (294a) or rejecting Prather's denials and those of the others implicated (1460-61a, 1468a, 1471a).[11] But even if the District Court had credited these "confessions", there are no findings which establish by "clear proof", or any proof, any one of the requirements of Section 6. In the first place, there is no evidence or finding that UMW "authorized" Prater to so induce the Dean employees. Secondly, while it does appear from evidence that Prater was authorized to organize employees (1453a), there is no evidence or finding that this general grant of authority "necessarily" or even inferentially, incidentally or permissively, included the authority to blow up a coal operator's equipment or commit any act of that character. And thirdly, there is no evidence that even remotely suggests that UMW ratified this alleged conduct.

3. That Field Representative Ross furnished gasoline to the men who went to the Parton mine on April 15th and caused Parton's truckers to dump coal on the ground (244a). Even disregarding plaintiffs' affirmative evidence that the gasoline was for picketing generally and not for picketing of the Parton mine, and undisputed evidence that Ross never discussed picket-

[11] The "confession" testimony of witnesses Aubrey Cook, Mit Day and Hubert Day implicates Prater. The evidence concerning this incident, however, is so contradicted by the testimony of others and is so contradicted by numerous other circumstances that it does not, we submit, constitute clear proof upon which UMW may be held liable herein.

ing of the Parton mine, still this evidence falls short of establishing liability under Section 6. The furnishing of gasoline for picketing in a lawful dispute, is not unlawful. There is no evidence in the furnishing of gasoline which constitutes evidence that Ross induced those men to stop Parton from mining. The only evidence is to the contrary (1494a). But even had Ross induced them to stop Parton, there is no evidence that Ross had been authorized by UMW to do so, or that he necessarily had that authority as a part of his job, or that such conduct had been ratified by UMW.

4. That Prater, by threats of violence, stopped the Dean operation on March 16, 1959. Initially we observe that the thrust of what Prater did was to induce the Dean employees to join the union; and this was not accomplished by violence. It was accomplished by persuasion. But even if violence had been used such evidence would not suffice under Section 6 for the same reason discussed in connection with Representative Ross above.

The evidence discussed in the four preceding paragraphs is the type of evidence upon which the Sixth Circuit affirmed the District Court's findings of liability. Its insufficiency is apparent for it expressly rests on the acts of field representatives and on persons wholly unknown, but not on their authorization by UMW. The plaintiffs recognized the error in the District Court's opinion on remand and moved the Court to amend its opinion to specifically find "clear, unequivocal and convincing proof showed that United Mine Workers of America, *itself,* authorized, ratified or participated in, those wrongful acts of violence". (Emphasis added.) The District Court however de-

clined to grant this motion holding that its intention in this regard had been expressed sufficiently in its second opinion (JSA 13-14). That opinion makes it clear that the authorization, participation and ratification on which the District Court predicated its findings of liability rested upon the acts of field representatives (JSA 4).

Plaintiffs may argue that *Gibbs* dictates a different conclusion—that *Gibbs* holds a field worker's participation in an unlawful act constitutes participation on the part of the parent union. *Gibbs* dealt with a case in which there was an absence of participation by a field worker in unlawful conduct. *Gibbs,* however, did not water down the requirements of the *Carpenters'* case, and the significance of *Carpenters* is that participation by an officer or member, in the absence of clear proof of authorization so to do, is not participation on the part of the parent union. A different analysis of the *Carpenters'* case renders that decision, as well as the will of Congress as stated in Section 6, meaningless.

The Sixth Circuit's decision herein, as well as the District Court's memoranda, manifest the difficulty the Courts have experienced in making proper application of Section 6. Indeed here the rule, and its requirements, are simply not discussed by the Sixth Circuit.

We submit that the confusion which has attended application of this rule, as well as the decision herein and the conflict in decisions noted, warrants the grant of the writ.

II

The Sixth Circuit's Approval of the Damage Awards Herein Is in Conflict With This Court's Gibbs and Pennington Decisions

The affirmance below of the damage awards to Dean and Parton conflicts with *UMW* v. *Gibbs,* 383 U.S. 715 (1966). *Gibbs* holds that state law is applicable to violent aspects of labor disputes and that remedies, including the award of damages, may be imposed under state law in such situations. It rejected, however, the concept that violence taints the entire union activities in an economic dispute. Contrarily *Gibbs* holds (383 U.S. 729) the "permissible scope of state remedies in this area is strictly confined to the direct consequences of such conduct and does not include consequences resulting from associated peaceful picketing or other union activities". The damages awarded to Dean and Parton are at odds with this principle. The awards here are not limited as required by *Gibbs* but are predicated on a theory which erroneously attributes all losses to the allegedly illegal aspects of an otherwise legal labor dispute.

The evidence shows why the awards should not stand. Uncontradicted evidence, for a prime example, establishes that most of the Dean employees went on strike and remained on strike even after Dean started hiring replacements. The refusal of the striking Dean employees to work was the main reason Dean lost money in 1959 and 1960 (594-95a, 609a) and those losses constitute the main element of the damages awarded Dean. We believe under *Gibbs,* and indeed as a hornbook proposition that "workers are privileged to cause harm to another by concerted action if the object and the means of their concerted action are proper". *Restatement of Torts,* § 775. Neither the

opinion of the District Court nor the affirming opinion of the Sixth Circuit gives recognition to this principle.

The opinions are also clearly erroneous for they permit, contrary to *UMW* v. *Pennington,* 381 U.S. 657, the recovery of losses sustained because of an increase in the Walsh-Healey minimum wage.[12] It is a mathematical certainty that both Dean and Parton had higher operating costs in 1959 and 1960 because of the Walsh-Healey increase. Those costs had been a factor in the commencement of this litigation for both companies had then asserted the right to recover substantial damages from UMW under the Sherman Act on the theory that UMW had wrongfully induced the Secretary of Labor (66a, 78a) to promulgate the wage rates in question. This theory, of course, did not survive *Pennington,* in which this Court held (381 U.S. 671) that losses resulting from the Secretary's determination should be excluded from any award of damages. Notwithstanding the certainty of proof and the allegations of Dean and Parton's complaints on the impact of Walsh-Healey costs, this factor was disregarded in the opinion below as "not a major influence" (JSA 5). This holding should not be permitted to stand for it accomplishes precisely what *Pennington* said should not be done.

Finally the damage awards should be set aside for they are not "strictly confined", as *Gibbs* requires, to the direct consequences of violence or threats of

---

[12] The initial wage determination under the Walsh-Healey Act for the bituminous coal industry was made effective on contracts entered into for more than $10,000 after November 25, 1955 and established a wage of $2.245 per hour. A subsequent determination, effective September 20, 1958 increased the rate to $2.745 (Vol. 20, No. 209, Vol. 23, No. 185).

violence. There was no episode of violence at the Dean mine after June, 1959, nor was there at the Parton mine save for a shot allegedly fired at Parton by an unknown person in the fall of that year. Both Dean and Parton, however, were permitted to recover damages allegedly sustained in 1960, months, indeed more than a year, after the final episode of violence. It was said in *Gibbs*: "The fact that ripples of earlier violence may still be felt should not be permitted, and under Section 6 is not permitted, to impose such liability". The award of damages against UMW for the consequence of long prior violence, the question of responsibility aside, is violative of that principle.

CONCLUSION

For the reasons assigned, Petitioner prays that the Petition for Writ of Certiorari should be granted and that the writ issue to review the judgments as aforesaid.

Respectfully submitted,

EDWARD L. CAREY
HARRISON COMBS
WILLARD P. OWENS
900 Fifteenth Street, N. W.
Washington, D. C. 20005

M. E. BOIARSKY
512 Kanawha Valley Bank Bldg.
Charleston, West Virginia 25330

E. H. RAYSON
Valley Fidelity Bank Building
Knoxville, Tennessee 37901

May, 1970

APPENDIX

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Civil Action No. 4463

DEAN COAL COMPANY

v.

UNITED MINE WORKERS OF AMERICA

Civil Action No. 4998

W. R. PARTON, d/b/a PARTON COAL COMPANY

v.

UNITED MINE WORKERS OF AMERICA

Memorandum

These cases were remanded to this Court by the Sixth Circuit for the further determination of the degree of proof required in support of Dean's and Parton's contentions to entitle them to recover and whether or not this Court applied the standard of proof provided for under Section 6 of the Norris-La Guardia Act (29 U.S.C. § 106) as interpreted in *United Mine Workers of America* v. *Gibbs*, 383 U. S. 715.

In the *Gibbs* case the Supreme Court, speaking through Mr. Justice Brennan stated, in effect, that before a union may be held liable in a labor dispute the proof must clearly show that a union representative actually participated in the wrongful acts, or gave prior authorization for such acts or ratified them after actual knowledge of their commission.

This Court intended to apply the "clear proof" standard in its findings and conclusions contained in its original memorandum. We were familiar with that standard at the time the cases were tried. We now reaffirm our original findings that clear proof established that the defendant, United Mine Workers of America, through its field representatives authorized, participated in, or ratified the wrongful acts of violence set out in this Court's original memorandum and that those acts of violence were the proximate cause of damage to plaintiffs Parton and Dean.

Plaintiffs entered the coal mining business in East Tennessee in 1954 with the development of the TVA Steam Plant System. The demand for coal in Eastern Tennessee was changing from high grade domestic coal for home and industrial burning to the lower grade steam or by-product coal. This resulted in the replacement of most of the old deep mines by surface or stripping operations.

Plaintiffs were engaged in contour stripping, that is, with earth moving equipment they removed the overburden from coal outcropping and proceeded along the seam or ridge line blasting and digging out the coal and loading it in trucks for hauling to a railhead, or in some cases, all the way to the steam plant. Whether a particular seam of coal can be economically mined depends upon such natural conditions as quality, thickness, amount of overburden, adaptability of terrain for the building of haul roads and the usually increasing distance to the loading point. Weather in the months of January, February and March usually precluded profitable production in Eastern Tennessee. Equipment is another factor to be considered in determining profit-making capabilities of strip mining operators. Both plaintiffs had adequate equipment for strip mining.

Wages paid by Dean increased beginning in 1955 because of the minimum wage rates established under the Walsh-

Healey Act. The hourly wages paid by Dean were as follows:

Year	High	Low
1955	2.25	1.50
1956	2.50	2.25
1957	2.50	2.25
1958	2.50	2.25
1959	3.00	2.75

Exhibit 84 indicates that wage rates were not a major influence on the profits of Dean, probably because of the relatively small number of employees. Dean made a profit of approximately $45,000.00 in 1965, which was the year before the trial.

Dean's earnings from 1955 through 1962 were as follows:

1955	$32,407
1956	31,710
1957	17,226
1958	2,469 a loss
1959	37,531 a loss
1960	13,249 a loss
1961	1,233
1962	13,441

It is noted that Dean lost money during the years 1958, 1959 and 1960, the major sum of $37,531.00 being in 1959. Defendant contends that the loss in 1960 included the cost of moving to another location, the building of roads for use at another location, and back pay to certain employees for violation of the Walsh-Healey Act, none of which was related to violence. Dean's President Ross testified that the moving was necessitated by "so much trouble on the other side of the mountain," referring to the incidents of violence occurring in 1959. A substantial portion of the back wages were paid to guards who "worked around the clock" protecting the equipment following the violence. Joint Appendix 639.

Defendant argues that the losses sustained by Dean in 1959 were not the direct result of violence or threats of violence committed by UMW or persons authorized by UMW. Defendant correctly points out that the Court may not in any event find that losses sustained by Dean prior to March 16, 1959 were a direct consequence of unlawful acts. Dean's production in 1959 during the months of January, February and March was low as compared with 1958, a year in which Dean also sustained a loss. Defendant argues that it is reasonable to assume that a significant part of Dean's 1959 loss is attributable to that period of 1959 prior to the commencement of the labor dispute. (Ex. 142-2259a, Printed Appendix.)

The lower level of production in those early months of 1959 is not significant in assessing the lost profits caused by violence. As previously indicated those three winter months were usually periods of low production. Exhibit 142 (page 2259a, Printed Appendix) shows that production by Dean in those months was in every year a small proportion of the production achieved in the remaining months.

Defendant also contends that the fact that Dean had sustained a loss in 1958 under operating circumstances at least as favorable as those which obtained in 1959 and 1960 shows that he did not sustain damages by reason of loss of profits; that during the year 1958, prior to the dispute, Dean supplied coal to TVA under its T-16, T-17 and T-10 contracts on which Ralph Ross acknowledged that he lost money (1165a-1167a, Printed Appendix); that it appears from Exhibit 142 (2259a, Printed Appendix) that he continued to produce on the T-10 contract in January, 1959; that Dean closed his mine for the winter season in January, February and March, 1960; that the contracts on which he supplied coal in 1960 were not at a price which enable Dean to make a profit; that the significance of the price factor of the 1960 production is emphasized by rea-

son of the fact that one of these contracts continued over in 1961; that although 1961 found Dean producing far more coal than it had in previous years, it nevertheless operated on virtually a break-even basis. (Ex. 142-2259a, Printed Appendix.)

Before discovering its inadvertent error in reading Exhibit 142, defendant relied heavily on the contention that Dean continued to produce in 1959 under contract number T-10 on which it had failed to make a profit in 1958. The exhibit shows that Dean produced under T-10 in 1959 only in the month of January. Contrary to defendant's original impression, Exhibit 159 (filed in the record, but not appearing in the Printed Appendix) establishes that the production contract for 1959 was at significantly higher price and quantity levels than the contracts for 1958.

The 1958 contracts to Dean were shown by Exhibit 159 to be as follows: T-17, made December 20, 1957, for six months for 1,718 tons per week, at a price of $3.23, and subsequently evaluated as costing TVA 19.98 cents per million BTU; T-10, made June 20, 1958, for six months at 1,667 tons per week, at a price of $3.37 per ton, and subsequently evaluated as costing TVA 20.47 cents per million BTU.

T-7, the contract under which Dean operated during 1959 and part of 1960, was entered March 6, 1959, provided for purchase of 1,983 tons per week for 12 months at a price of $3.43 per ton, and was evaluated as costing TVA 21.03 cents per million BTU. Violence which was authorized, caused, or ratified by the defendant through its representatives kept Dean from filling the contract; and Exhibit 84 (page 2216a of the Printed Appendix) shows that the largest drop in Dean's tonnage occurred in 1959.

Having in mind the rule of certainty that is required to prove some damage, the Court in arriving at the damage figure adopts the defendant's views that production condi-

tions in 1958 and 1959 were comparable and that the Court should make no assessment of Ralph Ross' testimony that the losses of 1958 were primarily attributable to his heart attack in the fall of that year. Dean practically broke even in 1958. The two 1958 contracts, T-17 and T-10 average $3.30 in price. This is 13 cents per ton below what Dean would have realized in 1959 under contract T-7. At the rate of production experienced in 1958 of 87,646 tons, the extra 13 cents would amount to $11,394.00 greater income for 1959.

Further, the company had more tonnage contracted in 1959 under those higher prices than it had in 1958 under the lower prices, and the extra tons in 1959 would have been produced free of the fixed costs. The two 1958 contracts averaged 1692 tons per week. The 1959 contract averaged 1983 tons per week. This would mean 291 tons per week difference and for fifty weeks would mean 14,550 more tons in 1959. At the 13 cents per ton increased income, this would mean $1,891.00 more income in 1959, in addition to the $11,394.00, or a total of $13,285.00.

The trend of the TVA market shown at 200a of the Printed Appendix contained in the previous findings of this Court shows no reason to anticipate contracts procured by Dean in 1959 for filing in 1960 would have produced lower profits in 1960 than in 1959. In the opinion of the Court, and the Court concludes, that Dean sustained at least $26,500.00 of lost profits for these two years.

The Court further finds that Dean sustained $51,000.00 operating losses for the years 1959 and 1960, proximately caused by the defendant. In addition to the compensatory damages of $77,500.00, Dean is entitled to recover $50,000.00 punitive damages as heretofore fixed by the Court.

The Court recognizes the difficulty in determining the profits lost by Dean as a direct and proximate result of

defendant's wrongs. If the fact of damage is established, uncertainty as to the extent is not prohibited.

> ". . . It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect to their amount . . ."
>
> *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 562

W. R. Parton started his business as a bulldozer operator in 1954 and ended that way in the late summer of 1959, as it was in that year that he tried unsuccessfully to resume his strip mining operations. Although his business was much smaller than Dean's, his annual profit per ton was larger than that of Dean. Detailed testimony of the wages paid by Parton is absent. His labor cost increased from year to year, but the wage increase in 1956, provided for under the Walsh-Healey Act, did not prevent him from making a profit. (Exhibits 43, 44). He lost money in 1958 as it was in that year that he moved to a new seam of coal and built access roads. His production records show that when he resumed operation in August, 1959 his production for the first two months was comparable to that of the same months in 1958. He could not get truck drivers to continue hauling after the first two months in 1959 and had to guard his equipment after working hours during that period. A bulldozer which he was operating was hit by bullets late one afternoon. The production records show a sharp decline in October and November in

comparison with 1958, the lowest in Parton's five years up to that time, and production ceased during the following month.

The defendant questions the findings of the Court that Parton lost all of his investment in equipment valued at $65,000.00, pointing out that a #44 Lima shovel and a coal crusher were traded in for other equipment. During the summer Parton borrowed money on the crusher to make payments on the other equipment, and later his sons, who operated a trucking company, paid off the note and took the crusher. The Lima shovel was traded in on a new bulldozer in the fall of the year when Parton was trying to get back into production. Parton lost everything following the interruption of his business in April, 1959. The insurance on his employment was cancelled because of the dynamite explosions which destroyed other equipment in the vicinity at the time. This made it impossible for Parton or for prospective purchasers of the equipment to negotiate new loans on the equipment. He testified that he "just did not have any coal business and lost everything" and could not even employ an accountant to help him file his income tax report.

In 1966, at the time of the trial, he had no assets and there was an unpaid judgment against him in favor of the United Mine Workers of America Welfare Fund in the amount of $58,777.59. His itemized estimate of the value of his equity in the various pieces of equipment was between $76,200.00 and $78,700.00.

His contract history is not as plainly earmarked as Dean's. The record is blank on his prices, except that in 1957 and 1958 he sold a lot of coal on TVA spot contracts at very low prices and the two term contracts that appear in the record in his name. These two term contracts, Exhibit 159, were as follows: T-9, made June 20, 1958 for six months for 1,000 tons per week (shared by Howard Coal Company) at a delivered price of $4.64, evaluated at

20.42 cents per million BTU. T-6, made January 23, 1959 for twelve months for 1,242 tons per week at the same price as T-9 (also shared by Howard Coal Company).

He testified that he could not fill out his tonnage in 1958 with contracts and he spent a good deal of time and expense that year in building access roads for his operation and repairing at a cost of $2,500.00 a county bridge that he broke. His tonnage and profits for 1954 and later years are shown (Exhibit 43, 2204a, Printed Appendix) as follows:

Year	Tons	Net Profit
1954	28,189.26	$19,865.90
1955	28,047.62	12,038.14
1956	45,782.33	25,409.03
1957	39,154.70	1,633.41
1958	22,968.83	9,414.22 loss
1959	10,936.55	
1960	no operation	90,000 (equip)
1967	no operation	no operation

He should have made profits in 1959 and 1960 without the violence. His loss in 1958 of $9,414.22 is explainable by two factors: (1) the costs of building the roads and repairing the bridge mentioned above, and (2) the reduction of his tonnage in 1958 to about half of previous production. His depreciation alone was costing around $25,000.00 per year and *if* he had gotten the contracts and doubled the 1958 production figure of 22,000 tons and produced 45,000 as he did in 1956, the extra 22,000 tons would have been produced without any charge for depreciation, or at $25,000.00 below the cost of the first 22,000 tons. He would have done at least as well as he did in 1957 when he made $1,600.00.

He sold 18,200 tons (about one-half his 1957 production) on spot contracts that only average 18.92 cents per million BTU (463a-464a, Printed Appendix). Yet he made

some money. His 1959 contract was evaluated at 20.36 cents per million BTU (Exhibit 159.) It was to last a year. A reasonable estimate would be that his 1959 profits would be above his 1957 profits. He had his roads built and he was ready to operate without any of that expense in 1959. Since the record shows half his 1957 production was evaluated at about 1½ cents per million BTU below his 1959 contract (about 37 cents per ton), if only half of his 1957 tonnage be considered, he should have made $7,400.00 more than he did in 1957, when the business operated virtually on a break-even basis.

The trend in the TVA market showed no reason to expect a lower profit in 1960.

The Court, therefore, finds that Parton's loss of expected profits in 1959 and 1960 was $14,800.00. He lost $65,000.00 in equipment. His compensatory damages, therefore, amount to $79,000.00. In addition to this sum of $79,800.00 he is entitled to recover $50,000.00 punitive damages previously assessed.

ROBT. L. TAYLOR
United States District Judge

APPENDIX B

Nos. 19610 and 19611

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DEAN COAL COMPANY,
Plaintiff-Appellee,

v.

UNITED MINE WORKERS OF AMERICA,
Defendant-Appellant.

W. R. PARTON d/b/a W. R. PARTON COAL COMPANY,
Plaintiff-Appellee,

v.

UNITED MINE WORKERS OF AMERICA,
Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Tennessee, Northern Division.

Decided February 18, 1970.

Before: EDWARDS, PECK and COMBS, Circuit Judges.

PER CURIAM. We herein once again consider issues arising out of what one judge has referred to as "a spate of litigation between coal operators in [certain] Counties, Tennessee, and United Mine Workers of America . . . resulting from labor disputes that arose in 1955 and continued intermittently through 1959." *Lewis* v. *Pennington,* 257 F. Supp. 815, 817 (E.D. Tenn. 1966). The two present cases were consolidated for trial with six others and were tried without a jury. Plaintiffs-appellees primarily sought recovery under the Sherman Act but their claims in this regard were dismissed. *Lewis* v. *Pennington, supra; aff'd,* 400 F.2d 806 (6th Cir. 1968), *cert. denied,* 393 U.S. 983 (1968). However, judgments were entered by the District Court on the common law counts but they were reversed by

this Court and the six cases were remanded for further proceedings. *Lewis* v. *Pennington, supra.* On the remand, the finding of liability was reaffirmed and judgments were entered in favor of plaintiffs-appellees for both compensatory and punitive damages. The two present appeals, which were combined for briefing, argument and consideration in this Court, were perfected from those judgments.

The two issues which are here presented concern liability and compensatory damages; no issue is raised with reference to the punitive damages allowed. With reference to the first of these issues, when these cases were last before us we stated (400 F.2d 816):

> "We are of the opinion that in this lengthy record of a protracted trial, including testimony of interference with hauling operations, verbal threats of work stoppages, the wanton discharge of firearms, the placing of a dynamite charge (albeit unexploded), distribution of gasoline in areas of frequent destruction by arson, all in a locality tense with fear and anger, evidence exists from which conspiracy to commit illegal violence could be found, and that evidence was presented upon which damages under Tennessee law could be predicated. As already indicated, however, we cannot on that record and from the District Court's opinion determine that the proper requirement as to the degree of proof was applied as to the elements essential to liability and recovery of damages in the amounts assessed. Accordingly, it is concluded that a remand for the purpose of reviewing the evidence in the light of the proper standard of proof is required.
>
> If liability is established upon remand, either by reexamination of the evidence in light of the proper standard or by confirmation that such standard had in fact been applied in the first instance, an award of damages attributable to the UMW's violence would of course be proper."

Upon remand, and responsive particularly to the last sentence just above quoted, in his extensive memorandum

opinion the District Judge stated, "This Court intended to apply the 'clear proof' standard in its findings and conclusions contained in its original memorandum. We were familiar with that standard at the time the case were tried. We now affirm our original findings that clear proof established that the defendant, . . . through its field representatives authorized, participated in, or ratified the wrongful acts of violence set out in this Court's original memorandum and that those acts of violence were the proximate cause of damage to plaintiffs Parton and Dean." A reexamination of the record satisfies us that there is sufficient evidence in the record to support Judge Taylor's determination that the issues resolved were established by the proper quantum of evidence.

Turning to the question of compensatory damages, we frankly observe that the evidence supporting the damage claims leaves much to be desired. On the other hand, it must be recognized that precision of computation in the areas of these claims is by their very nature made difficult of achievement. Judge Taylor's memorandum on remand clearly demonstrates the zeal with which he approached the task of determining compensatory damages and the fact that he was conscious of the mitigating factors as well as the affirmative elements of damage to be considered. As in the case of the liability issue, our reexamination of the record and the exhibits fails to disclose prejudicial error in the method of determination. In this regard, it seems not unfair to point out that while appellant is critical of the basis of determination, no alternative standards for a reassessment of damages by this Court or for use as guidelines in the event of a further remand are offered. Similarly, it is recalled that extensive questioning from the bench during oral argument failed to elicit any suggestion as to a more definitive yardstick for either of these purposes. We are accordingly compelled to the conclusion that the District Court's allowance of compensatory damages should not be disturbed.

Affirmed.

APPENDIX C

§ 106. Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. Mar. 23, 1932, c. 90, § 6, 47 Stat. 71.